

# DISPUTE RESOLUTION ALERT

## IN THIS ISSUE

### TRANSFORMING THE INSOLVENCY SECTOR: THE CONSTITUTIONAL COURT HAS THE LAST WORD

On 5 July 2018, the Constitutional Court dismissed an appeal by the Minister of Justice and Constitutional Development and another in the case of *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20. In this case, the Minister challenged the decision by the Supreme Court of Appeal (SCA) that found a Policy, which sought to regulate the appointment of insolvency practitioners as a basis to transform the insolvency industry, to be unconstitutional and irrational.

# TRANSFORMING THE INSOLVENCY SECTOR: THE CONSTITUTIONAL COURT HAS THE LAST WORD

This brief alert is a follow-up to our previous article published on the SCA judgment and is aimed at reporting on the Constitutional Court judgment.

*The court found that the methodology impermissibly discriminated against other races whose interests it sought to advance on the ground that they became citizens on or after 27 April 1994.*

On 5 July 2018, the Constitutional Court dismissed an appeal by the Minister of Justice and Constitutional Development and another in the case of *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20. In this case, the Minister challenged the decision by the Supreme Court of Appeal (SCA) that found a Policy, which sought to regulate the appointment of insolvency practitioners as a basis to transform the insolvency industry, to be unconstitutional and irrational.

This brief alert is a follow-up to our [previous article](#) published on 1 February 2017, on the SCA judgment and is aimed at reporting on the Constitutional Court judgment.

## The Policy

You may recall from the SCA judgment that the Policy gave the Master of the High Court the power to appoint an insolvency practitioner regarded as a 'previously disadvantaged individual' (as defined in the Policy) to act as a co-trustee alongside an experienced practitioner so that he or she could learn from the experienced trustee how properly to administer an estate, in order to gain sufficient experience in the industry.

## The basis for the invalidity

Section 9(2) of the Constitution is one of the provisions that authorises the adoption of remedial measures to address inequality and advance persons who were disadvantaged by unfair discrimination. In unpacking the provisions of s9(2), the court stated that such remedial measures must be "directed at an envisaged future outcome".

The court found that the Policy's methodology of lumping up African, Coloured, Indian and Chinese practitioners with the advantaged white males who dominate the entire industry in terms

of numbers afforded everybody (in a category identified in the Policy) an equal opportunity of being appointed depending on whether they became citizens on or after 27 April 1994. Moreover, the court found that the methodology impermissibly discriminated against other races whose interests it sought to advance on the ground that they became citizens on or after 27 April 1994. To this extent, the court concluded that the Policy did not constitute a restitutionary measure envisaged in s9(2) of the Constitution. The court also stated that it undermined the progressive realisation of equality which the other parts of the Policy were designed to achieve.

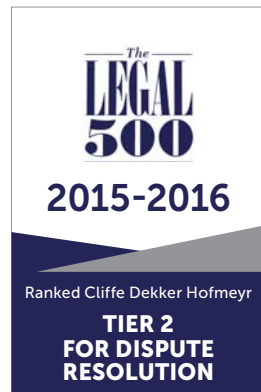
In dismissing the appeal, the Court concluded that the Policy was not reasonably capable of achieving equality on the basis that certain of its provisions were arbitrary and constitutionally invalid.

Inasmuch as the court dismissed the appeal, the need to transform the insolvency sector cannot be overemphasised. The issue is now left to the Minister to review the Policy in its current form through engagement with the stakeholders to ensure that it passes the test of rationality envisaged by the Constitution.

*Mongezi Mpahlwa*

# Best Lawyers 2018 South Africa

## NAMED CDH LITIGATION LAW FIRM OF THE YEAR



- CHAMBERS GLOBAL 2017 - 2018 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.
- CHAMBERS GLOBAL 2018 named our Corporate Investigations sector as a Recognised Practitioner.
- CHAMBERS GLOBAL 2018 ranked our Dispute Resolution practice in Band 2: Insurance.
- CHAMBERS GLOBAL 2018 ranked our Dispute Resolution practice in Band 2: Media & Broadcasting.
- CHAMBERS GLOBAL 2017 - 2018 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.
- Janet MacKenzie ranked by CHAMBERS GLOBAL 2018 in Band 3: Media & Broadcasting.
- Julian Jones ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 3: Restructuring/Insolvency.
- Tim Fletcher ranked by CHAMBERS GLOBAL 2018 in Band 4: Dispute Resolution.
- Pieter Conradie ranked by CHAMBERS GLOBAL 2012 - 2018 in Band 1: Dispute Resolution.
- Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 2: Dispute Resolution.
- Joe Whittle ranked by CHAMBERS GLOBAL 2016 - 2018 in Band 4: Construction.

## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Thabile Fuhrmann**  
Chairperson  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Timothy Baker**  
Director  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

**Roy Barendse**  
Director  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Tracy Cohen**  
Director  
Business Development  
T +27 (0)11 562 1617  
E tracy.cohen@cdhlegal.com

**Lionel Egypt**  
Director  
T +27 (0)21 481 6400  
E lionel.egypt@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Julian Jones**  
Director  
T +27 (0)11 562 1189  
E julian.jones@cdhlegal.com

**Tobie Jordaan**  
Director  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

**Corné Lewis**  
Director  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

**Janet MacKenzie**  
Director  
T +27 (0)11 562 1614  
E janet.mackenzie@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Zaakir Mohamed**  
Director  
T +27 (0)11 562 1094  
E zaakir.mohamed@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)11 562 1140  
E byron.oconnor@cdhlegal.com

**Ashley Pillay**  
Director  
T +27 (0)21 481 6348  
E ashley.pillay@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Willie van Wyk**  
Director  
T +27 (0)11 562 1057  
E willie.vanwyk@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Willem Janse van Rensburg**  
Executive Consultant  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Marius Potgieter**  
Executive Consultant  
T +27 (0)11 562 1142  
E marius.potgieter@cdhlegal.com

**Jonathan Witts-Hewinson**  
Executive Consultant  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

**Nicole Amoretti**  
Professional Support Lawyer  
T +27 (0)11 562 1420  
E nicole.amoretti@cdhlegal.com

### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2018 7063/AUG

